



Australian Government
The Treasury

TSY/AU

Reform of the Australian Charities and Not-for-profits Commission secrecy provisions

Recommendation 17 of the ACNC Review 2018
July 2021

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Consultation Process

Request for feedback and comments

Interested parties are invited to submit their responses to the discussion questions.

Electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted.

If you would like part of your submission to remain in confidence, you should provide this information marked as such in a separate attachment. A request made under the *Freedom of Information Act 1982 (Cth)* for a submission marked 'confidential' to be made available will be determined in accordance with that Act.

Closing date for submissions: 22 August 2021

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Reform of the ACNC secrecy provisions

Purpose

The purpose of this consultation paper is to seek stakeholder feedback and views on the issues identified in recommendation 17 of the *Strengthening for Purpose: Australian Charities and Not-for-Profit Commission Legislation Review 2018* (ACNC Review). Specifically, the consultation paper seeks to understand stakeholder views around the following:

- concerns and impacts of the ACNC's current secrecy provisions;
- views about the benefits and sensitivities of public disclosure of certain information about the ACNC's regulatory activities;
- circumstances under which the ACNC should disclose information about its regulatory activities to the public; and
- factors and risks that should form the basis of a discretion when considering whether or not to disclose information to the public.

To assist stakeholders in understanding the issues identified in the ACNC Review, the paper provides a comparison of the ACNC's current secrecy provisions with the disclosure rules of other regulators. The paper will also explore the issues surrounding three areas identified in the ACNC Review where the ACNC is limited in its ability to disclose information about its regulatory activities.

Background

What are the ACNC's secrecy provisions?

Broadly, the secrecy rules provide a general prohibition on the disclosure of information provided by charities to the ACNC. However, disclosure of this information is allowed in the following situations:

- in the performance of the duties of an ACNC officer under the ACNC Act;
- for the purposes of including information on the ACNC Charity Register¹;
- where the information is provided to an Australian government agency (subject to certain conditions being met);
- if a charity consents and there is a specific purpose for the disclosure; or
- if the information has already been lawfully made available to the public (e.g. the relevant charity itself publicly discloses information).

What were the findings of the ACNC Review?

Tension in the secrecy provisions

The ACNC Review identified a tension between a registered charity's right to privacy and the ACNC's regulatory responsibilities to protect public trust and confidence in the sector as well as ensure the public has access to information about registered charities. The ACNC Review also stated that this tension is more prominent due to the nature of the charity sector, where the need for accountability

¹ Section 40-5 of the ACNC Act specifies certain information to be included on the register. This includes information such as the name, contact details and identifying details for each charity, the type of registration, governing rules, responsible persons, financial information, etc.

and transparency about registered charities (and the regulatory activities of the ACNC) are of greater importance. This is because the public has an interest in the affairs of charities because they are supported through donations from the public as well as government funding, exemptions, concessions and benefits.

The ACNC's secrecy provisions attempt to strike a balance between protecting personal and confidential information that registered charities provide to the ACNC but also allowing disclosures of that information in some circumstances where it is necessary for ensuring effective government administration in accordance with the ACNC Act.

Findings of the ACNC Review

The ACNC Review concluded that the current secrecy provisions 'are overly restrictive and should be amended to allow the Commissioner to disclose information in a wider range of circumstances'. This is because the ACNC's inability to make comments about some of its regulatory activities is harmful to the perception of the ACNC as an effective regulator.²

The ACNC Review broadly identified three areas where the current secrecy provisions overly restrict the extent to which the ACNC can publicly disclose information about its regulatory activities. These areas include:

- 1) reasons for registration decisions;
- 2) information about new or ongoing investigations; and
- 3) information about finalised investigations and resulting compliance action.

Recommendation 17 and Government response

The ACNC Review recommended that 'the Commissioner should be given a discretion to disclose information about regulatory activities (including investigations) when it is necessary to protect public trust and confidence in the sector'.³

In its response, the Government supported the recommendation. The Government also committed to consult on the detail of the change, including the triggers for and bounds of the Commissioner's discretion.⁴

Questions

- 1) What is your experience of the ACNC's current secrecy provisions in your capacity as an individual, charity or other organisation?
- 2) What concerns, if any, do you have about the ACNC's current secrecy provisions?

How does the ACNC compare with other regulators?

Overview

This section of the paper provides readers with a contextual understanding of how the ACNC and comparable Australian regulators/foreign charity regulators generally approach disclosing information to the public about their regulatory activities. This is illustrated in Table 1 below.

² Final report to the ACNC Review 2018, p. 76.

³ Final report to the ACNC Review 2018, p. 77.

⁴ Government Response to the ACNC Review 2018, p. 15.

Table 1

| Regulator | Can it disclose reasons for registration decisions? | Can it disclose information about new or ongoing investigations into a particular entity? | Can it disclose information about finalised investigations and resulting compliance actions? |
|--|---|---|--|
| Australian Regulators | | | |
| <i>Australian Charities and Not-for-profits Commission</i> | No. Only the fact that an entity is registered is published | No | Where finalised investigations result in certain compliance actions (e.g. warnings, directions, undertakings, etc.)* |
| <i>Australian Securities and Investments Commission</i> | No. Only the fact that an entity is registered is published | Yes, when in the public interest | Yes |
| <i>Australian Competition and Consumer Commission</i> | N/A | Yes, when in the public interest | Yes |
| <i>Australian Taxation Office</i> | N/A | No | Limited to outcomes that are significant or criminal matters |
| International Regulators | | | |
| <i>United Kingdom Charity Commission</i> | Yes, when a decision is of wider interest | Yes, when in the public interest | Yes |
| <i>New Zealand Charities Services</i> | Yes, when a decision is of wider interest | No | Yes |
| <i>Canada Revenue Agency</i> | No. Only the fact that an entity is registered is published | No | Where finalised audits result in compliance actions |

* This does not include revocation of a charity's registration or other regulatory approaches; only compliance actions where the ACNC exercises its enforcement powers under Part 4-2 of the ACNC Act, such as issuing a warning, giving a direction, enforcing undertakings, and suspending or removing a responsible person of a charity. Examples of disclosures to the public about these compliance activities can be accessed from the ACNC website at www.acnc.gov.au/raise-concern/regulating-charities/action-taken-against-charities.

Australian regulators' general approaches to publicly disclosing information

Australian regulators comparable to the ACNC generally have more flexibility to disclose certain information about their regulatory activities when it is in the public interest.

While release of information relating to new or ongoing investigations is more the exception than the norm, comparable Australian regulators may make a public comment, for instance where there is media coverage about an issue or the regulator is called on to confirm whether or not it is investigating an entity. In circumstances where the information relates to a finalised investigation, these regulators will generally publish this information and the reasons for any resulting compliance action if it is in the public interest (except for the Australian Taxation Office which limits these disclosures to significant matters).

Australian Securities and Investments Commission (ASIC)⁵

ASIC considers that informing the public of regulatory activities is important as it promotes:

⁵ <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/public-comment-on-asic-s-regulatory-activities/>

- public confidence in ASIC’s administration of the law – that is, there is transparency around what ASIC is doing about people who break the law; and
- compliance with the law by informing the public about the standards ASIC expects and the consequences of failing to meet these standards.

ASIC may make a statement about an investigation when it is in the public interest to do so and will usually issue a media release when it secures a regulatory outcome such as a negotiated agreement.

ASIC may not release information to the public where, on balance, it may be against the public interest to do so (for example, to protect the legal rights of a person, to prevent a disorderly market, or where it may jeopardise a regulatory outcome).

In some circumstances third parties may suggest that ASIC is investigating a matter. ASIC will only verify these comments if it is in the public interest to do so.

Australian Competition and Consumer Commission (ACCC)⁶

The ACCC considers that informing the public about its enforcement work is an important part of its role as a regulator, in that it:

- promotes confidence in the market economy because consumers and businesses can see competition and consumer law working for them through the action ACCC takes against those who are breaking the law;
- deters companies, businesses and individuals from engaging in misconduct; and
- promotes compliance with the law by informing the public about the standards required under law and the consequences of failing to meet those standards.

The ACCC may publicly confirm the existence of an investigation into an entity where it is in the public interest and this outweighs the possible detrimental effect that public commentary may have on the entity under investigation. The ACCC may also provide updates on the progress of the investigation if it is in the public interest to do so, particularly where the conduct being investigated continues to be of considerable public comment and debate. Where an investigation is made public, the ACCC will usually make a statement at the conclusion of the investigation to report on the outcome.

Australian Taxation Office (ATO)⁷

The ATO is prohibited under law from commenting on the tax affairs of any individual or entity. This includes not commenting on the status of audits and investigations, and legal proceedings currently before the courts.

However, the ATO acknowledges that there may be times at which it is in the public interest to provide general commentary. In determining whether to make a statement about a particular investigation or provide updates on its progress, the ATO will consider a range of factors, including whether:

- the ATO has been publicly called upon to respond to an issue or undertake an investigation;
- making a statement is in the interests of maintaining public confidence in the ATO; or
- comment will aid the investigation.

⁶ <https://www.accc.gov.au/media/media-code-of-conduct>

⁷ <https://www.ato.gov.au/About-ATO/Contact-us/Media-enquiries/Media-expectations/>; and <https://www.ato.gov.au/Media-centre/>

Foreign charity regulators' general approaches to publicly disclosing information

In contrast to the ACNC, comparable foreign charity regulators adopt a more transparent approach to disclosing information about their regulatory activities. Generally, these disclosures can be made when it is in the public interest or for a particular purpose, or in situations where not disclosing the information would be against the public interest.

Where a registration decision may be of wider public interest, the UK Charity Commission and New Zealand Charities Services may publish the decision and its reasons. The UK Charity Commission may also make a public comment about a new or ongoing investigation when it is in the public interest. In circumstances an investigation is finalised, the UK, New Zealand and Canadian regulators routinely publish information on revocation of registrations and the reasons for the resulting compliance action.

United Kingdom Charity Commission⁸

Two of the UK Charity Commission's key strategic objectives are to hold charities to account and to deal with wrongdoing and harm. This is because charities are accountable to the public for the privilege of charitable status and the stewardship of charitable resources. The UK Charity Commission uses its authority and influence as the regulator to draw attention to misconduct that could jeopardise public confidence in the sector as a whole, and to strongly encourage the behaviour that the public expects of charities.

The UK Charity Commission publishes a full summary of its registration decisions when they are novel, significant, involve new purposes or set a legal precedent, or of wider interest.⁹

The UK Charity Commission does not routinely publish statements about all its regulatory cases. However, it may decide that releasing a statement would be in the public interest and/or increase public trust and confidence in charities. Examples of this condition being met include where:

- there is significant public interest and/or media coverage of a charity or the Commission's regulatory engagement with the charity on a particular issue;
- the Commission wants to correct the public record or to respond publicly to certain issues raised;
- it is made public that an individual connected with a charity has been convicted of an offence relating to a Commission case; or
- where the Commission considers that a case raises issues that may pose a risk to other charities or the donating public (in some such instances, it may also publish a general alert).

When it is in the public interest, the UK Charity Commission usually releases a public statement whenever it opens a statutory inquiry into a charity. The statement can include details about the purpose and reasons for the inquiry and any previous regulatory action with the charity that is relevant.

It is also the UK Charity Commission's policy after it has concluded an inquiry to publish a comprehensive report detailing what issues the inquiry looked at, what actions were undertaken as part of the inquiry and what the outcomes were.

⁸ <https://www.gov.uk/government/publications/charity-commission-strategy-2018-2023>; <https://www.gov.uk/government/collections/charity-commission-registration-decisions>; and <https://www.gov.uk/government/collections/charity-commission-reports-decisions-alerts-and-statements>

⁹ For context, the UK Charity Commission has published a total of nine registration (including non-registration) decisions over the last ten years. The latest published decision is from March 2017.

The UK Charity Commission will confirm, if asked by the media, whether it has a regulatory case into a named charity.

New Zealand Charities Services¹⁰

New Zealand Charities Services publishes decisions to register entities, court decisions, investigation outcomes and deregistrations (including reasons for those decisions) on the Charities Register.

New Zealand Charities Services publishes full statements about registration and non-registration decisions when agreed by the Charities Registration Board and where they provide helpful information for the charitable sector and for the wider public.¹¹ A decision may help develop greater public understanding of the meaning of a charitable purpose under law and why the regulator has registered or declined to register some applications.

In any manner it thinks fit, the New Zealand Charities Services may also publish a statement naming a charity or a person in connection with a charity that has engaged in misconduct or serious wrongdoing. The regulator may also publish a statement if a charity is no longer qualified to be registered and include a summary of the grounds for that opinion. When making a public statement the regulator is required under the law to provide a minimum of 20 days written notice to the entity the information relates to.

Canada Revenue Agency¹²

Information disclosure rules for the Canada Revenue Agency are similar to those of the ACNC with respect to registration decisions and information about ongoing investigations. However, the Canada Revenue Agency posts on its website information about charities when the agency revokes or annuls a charity's registration or when it imposes a sanction. To ensure the agency's reasons for its decision are transparent, it can release a copy of the letter(s) it has sent to a charity outlining the reasons for its compliance action.

Issue for consideration

Balancing privacy and transparency via a public interest test

As shown in the previous section, most other comparable regulators may disclose information about their regulatory activities when it is in the public interest. A public interest test seeks to balance the tension between protecting privacy and fulfilling a regulator's responsibilities to maintain public trust and confidence in the sector it is regulating.

The framework of a public interest test usually requires for there to be a range of factors, benefits and risks that must be taken into consideration when weighing up whether or not a disclosure of information is in the public interest. This section of the paper considers what these might be if a public interest test were to form the basis of the ACNC Commissioner's discretion to publicly disclose information about the ACNC's regulatory activities.

¹⁰ <https://www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/>; and <https://www.charities.govt.nz/charities-in-new-zealand/legal-decisions/about-legal-decisions-made-under-the-charities-act-2005/>

¹¹ For context, most decisions published on the New Zealand Charities Services website are non-registration decisions.

¹² <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/compliance-audits/audit-process-charities.html>

Factors and circumstances that may trigger a discretion

Public interest benefits

Drawing upon the examples of other regulators, circumstances where a disclosure of information could be necessary and in the public interest may include the following:

- there is significant public discourse about an issue;
- the information may be of wider public interest or serve to educate the sector and the public;
- the public record may require correction or clarification;
- the regulator has made a decision or taken action that could be precedential or significant;
- there is evidence of misconduct; and
- a case raises issues that may pose a risk to other registered charities or the public.

Therefore, a disclosure of information could be assessed as being in the public interest if the disclosure of information has the potential to achieve one or more of the following benefits:

- protect public trust and confidence in the charity sector and/or in the regulator;
- promote the transparency and accountability of the charity sector and/or the regulator to the public;
- deter misconduct or allay public concern about conduct in the charity sector;
- provide regulatory guidance about a particular regulatory or legal matter that the sector would benefit from; or
- correct the public record and clarify the facts around a particular case.

Question

- 3) If a public interest test were to form the basis of the ACNC Commissioner's discretion to disclose information about the ACNC's regulatory activities, what public interest benefits should the ACNC Commissioner take into consideration when exercising the discretion and why?

Public interest risks

Conversely, regulators may determine that a disclosure of information would not be in the public interest. Examples of these factors include where a disclosure of information will:

- interfere with or prejudice legal proceedings;
- be acutely detrimental to a particular individual or group of individuals, for example a risk to someone's personal safety;
- unduly impact commercial sensitivities or give rise to national security issues; or
- cause severe or disproportionate prejudice to a person or entity (including their reputation).

Question

- 4) If a public interest test were to form the basis of the ACNC Commissioner's discretion to disclose information about the ACNC's regulatory activities, what risk factors should the ACNC Commissioner take into consideration when exercising the discretion and why?

Potential areas for increased disclosure for consideration

The following section explores three areas in the current secrecy provisions that the ACNC Review identified as being overly restrictive. The section considers the issues surrounding these areas and the rationale for amending the secrecy provisions in these areas.

Area 1: Reasons for registration decisions

Quick Fact:

The ACNC receives around 4,000 applications for registration per year, of which on average 35 applications are refused for reasons other than insufficient information.

When an entity applies to the ACNC for registration as a charity, the ACNC Commissioner will make a decision on its eligibility based on certain criteria. If the entity is successful, the ACNC will include information about the entity on the ACNC Charity Register. This includes the entity's identifying details (name, contact, ABN, registration type, governing rules, responsible persons, etc.).

If the entity's application is refused, the applicant is advised of the decision and entitled to a review. The ACNC is unable to publish information about the entity, that it has rejected an application from the entity, or the ACNC's reason for its decision.

In contrast, the UK Charity Commission and New Zealand Charities Services publish full statements about their registration and non-registration decisions, including identifying details about an entity and its application, where the decision is of wider interest and it may educate the charitable sector (refer Box 1).

The ACNC Review identified disclosure of decisions on an application for registration on a de-identified basis as a circumstance where the ACNC Commissioner should be allowed to disclose information.

Box 1: New Zealand disclosure of charity registration decision

Date 13 September 2019

In its decision dated 12 September 2019 Te Rātā Atawhai, the independent Charities Registration Board, (the "Board") has decided to decline the application of Football Otago Youth Development Academy Trust to be a registered charity because it does not advance exclusively charitable purposes.

The role of the Board is to maintain the integrity of the Charities Register by ensuring that entities on the Charities Register qualify for registration.

The Board makes its decisions by applying the law to the facts before it. The Board must decline to register applications from organisations when they do not advance exclusively charitable purposes for the public benefit.

The Board has declined the Trust's application to be registered because the primary purpose of the Trust is to promote the development and success of young, high-performance football players selected on the basis of talent or skill, rather than to promote public participation in sport. The promotion of success in sport by players selected on the basis of talent or skill is not a charitable purpose and does not benefit a sufficient section of the public.

Although the Board considers some of the Trust's activities may advance education and promote public health through participation in sport, these activities are not the primary focus of the Trust, and therefore are insufficient to qualify the Trust for registration.

The Board also notes that the Trust was previously granted charitable status in 2010, before the insertion of section 5(2A) of the Charities Act 2005 in 2012. The Board considers that section 5(2A) makes a clear legislative statement on when sport can be considered to advance charitable purposes.

Roger Holmes Miller

Charities Registration Board

Full decision: [Football-Otago-Youth-Development-Academy-Trust.pdf](#)

Source: <https://www.charities.govt.nz/charities-in-new-zealand/legal-decisions/view-the-decisions/view/football-otago-youth-development-academy-trust>

Potential adverse risks

In the case of non-registrations, entities may not want the reasons for an unsuccessful application for charity registration published. This could be because this information may reflect poorly on the entity and damage its reputation.

Prospective applicants may be deterred from applying for charity registration if a potential rejection decision may be published on the ACNC website.

Rationale for change

Publishing registration decisions would provide the public with a broader understanding of the factors the Commissioner takes into account when assessing eligibility. The decision statements would provide guidance to other entities with similar circumstances that are considering applying for charity registration.

Questions

- 5) Do you have any concerns (other than privacy and confidentiality) about the disclosure of registration decisions?
- 6) Will your concerns be addressed if the information is de-identified?
- 7) Should a public interest test form the basis of the discretion to disclose information about reasons for registration and why?

Area 2: New and ongoing investigations

Quick facts:

According to the 2019-20 ACNC Annual Report the ACNC received 2,102 concerns about charities (mostly about perceived mismanagement of funds or individuals receiving private benefits). As the first step in an investigation, the ACNC conducts a risk assessment to understand the significance, likelihood and consequences of the issues raised. In 2019-20 the ACNC completed 58 risk assessments.

The ACNC cannot publicly disclose whether or not it has commenced an investigation into a charity in response to concerns raised about that charity, or if an investigation is ongoing.

In contrast, the approach of the UK Charity Commission is to be more transparent about its investigations. When it is in the public interest, the Commission's usual practice is to release a public statement on commencing a statutory inquiry into a charity (refer Box 2). The statement can include details about the purpose and reasons for the inquiry and any previous regulatory action with the charity that is relevant. Additionally, the Commission will confirm, if asked by the media, whether it has a regulatory case into a named charity.

The ACNC Review concluded that the ACNC's inability to make any comment in respect of whether it is (or is not) undertaking an investigation regarding a complaint against a registered charity is harmful to the perception of the ACNC as an effective regulator. The ACNC Review noted that when making a public disclosure, the Commissioner should consider, among other matters, the benefit to

the public of disclosure, the potential prejudice to any registered entity, whether disclosure might jeopardise an ongoing investigation and the risk of defamation.

Box 2: UK Charity Commission disclosure of new statutory inquiry

Press release

Regulator opens statutory inquiry into Birmingham-based education charity, after continued non-compliance with governance requirements

The Charity Commission has opened a statutory inquiry into the Birmingham Education Trust over concerns about the management of the charity by its trustees

From: [The Charity Commission](#)

Published 7 August 2020

The Charity Commission has opened a statutory inquiry into the Birmingham Education Trust ([1064365](#)), over concerns about the management of the charity by its trustees.

The charity funds and operates a school in Birmingham, which includes the promotion of the teaching of Islam to Muslim girls.

The Commission opened a compliance case into the charity in March 2019, to examine its repeated failure to comply with its statutory duty to file its accounts and annual returns. The case then identified wider concerns, including that the charity was operating in breach of its governing document in having only two trustees who were husband and wife. This also raised concerns about potential unmanaged conflicts of interest.

The Commission issued the trustees with an action plan to address and rectify the concerns, but the trustees have failed to demonstrate progress. The case has therefore been escalated to a statutory inquiry, which opened on 21 July 2020. The new inquiry will further examine the concerns identified at the charity, including whether:

- the charity has been operating for exclusively charitable purposes for the public benefit in furtherance of their charitable objects
- the financial controls of the charity are adequate, and their funds have been properly expended and can be accounted for
- the trustees of the charity have complied with their legal duties in respect of their administration, governance and management of the charity
- the trustees' compliance with legal obligations for the content, preparation and submission of the charity's accounts and other information or returns is in line with the statutory requirements
- potential conflicts of interest and connected party transactions have been properly managed
- the trustees have complied with previously issued regulatory guidance.

The Commission may extend the scope of the inquiry if additional regulatory issues emerge.

It is the Commission's policy, after it has concluded an inquiry, to publish a report detailing what issues the inquiry looked at, what actions were undertaken as part of the inquiry and what the outcomes were. Reports of previous inquiries are available on [GOV.UK](#).

Source: <https://www.gov.uk/government/news/regulator-opens-statutory-inquiry-into-birmingham-based-education-charity-after-continued-non-compliance-with-governance-requirements>

Potential adverse risks

The ACNC Review identified potential risks associated with disclosing the existence of an investigation prior to finalisation. Therefore, special consideration should be given to the following adverse risks to ensure they are properly balanced against the benefits of such a disclosure.

- Prejudicing a charity's access to natural justice whilst under investigation. This is particularly sensitive given that a registered charity's reputation is critical to its ability to raise funds and carry on its purpose.
- Damaging the reputation of a charity and individuals linked to the charity.
- Jeopardising an ongoing investigation through the untimely release of information.
- Harming public trust and confidence in the charity sector and/or the ACNC.

Rationale for change

The ACNC's inability to make any comment in respect of whether it is (or is not) undertaking an investigation regarding a complaint against a registered charity is harmful to the perception of the ACNC as an effective regulator. This could be particularly damaging to the ACNC in situations of significant media coverage about a particular charity's conduct.

The public (including persons who have raised a concern about a particular charity) are currently prevented from being able to know whether the ACNC is or isn't investigating the concern or if there have been any findings as a result of an investigation which has not resulted in certain kinds of compliance action. The blunt effect of the secrecy provisions may lead to a person believing that the ACNC is not taking their concern seriously.

In contrast, other Australian regulators and most notably the UK Charity Commission have the discretion to disclose information about new or on-going investigations, where disclosure is in the public interest.

Publicly disclosing that an investigation into a charity is underway may also assist the investigation by inviting the public (including past and present staff, volunteers, members, donors or beneficiaries of a registered charity) to provide valuable information they may have about the charity.

Questions:

- 8) Do you have any concerns (other than privacy and confidentiality) about the disclosure of the fact that an investigation into a registered charity has commenced or is ongoing or that no investigation is being undertaken?
- 9) Would your concerns be mitigated if the ACNC Commissioner could only confirm if an investigation is or is not underway?
- 10) Should a public interest test form the basis of the discretion to disclose information about new and/or ongoing investigations and why?

Area 3: Finalised investigations and resulting compliance action

Quick facts:

According to the 2019-20 ACNC Annual Report the ACNC finalised 79 investigations resulting in a range of outcomes including the revocation of charity registration for 18 charities due to serious and ongoing non-compliance. Due to the bushfires and COVID-19, the ACNC deferred action in some cases which meant they were not finalised in the 2019-20 year.

In the two previous years the ACNC finalised the following number of investigations:

- For 2017-18, the number of finalised investigations was 108, including the revocation of charity registration for 22 charities.
- For 2018-19, the number of finalised investigations was 100, including the revocation of charity registration for 12 charities.

When the ACNC finalises an investigation into a charity, the ACNC cannot publicly disclose this information unless the investigation itself results in certain compliance action. These compliance actions include if the ACNC exercised any of its enforcement powers under Part 4-2 of the ACNC Act, such as issuing a warning, giving a direction, enforcing undertakings, and suspending or removing a responsible person of a charity.¹³ Information about the investigation, including its findings, is published as part of the compliance action summary on the ACNC Charity Register.

However, when the ACNC finalises an investigation into a charity and does not exercise its enforcement powers under Part 4-2 of the ACNC Act, no information about the finalised investigation can be published. This is the case in the following situations:

- The ACNC investigates a charity and revokes the charity's registration;
- The ACNC adopts an alternative regulatory approach such as providing a charity with regulatory guidance or negotiating a compliance agreement;
- The ACNC investigates a charity and takes no action.

These above situations can arise in situations where a charity is not a Federally Regulated Entity (non-FRE), and therefore the ACNC cannot exercise its enforcement powers under Part 4-2 of the ACNC Act.

Additionally, whilst the fact that a charity's registration has been revoked is ordinarily published on the ACNC Charity Register (this includes the entity's name, the date of effect of revocation and if revocation was voluntary), the ACNC cannot publish any information about the circumstances surrounding the revocation or the reasons for the ACNC's decision to revoke.

The ACNC Review stated that information regarding a completed investigation may be of broader educational value to the sector. The ACNC Review also noted that a perceived lack of action by the ACNC in relation to non-FREs and the ACNC's inability to disclose the reasons for revocation decisions may undermine confidence in the ACNC and the regulatory framework under the ACNC Act.

Rationale for change

Information about completed investigations may be of educational value to the sector, by illustrating the standards of compliance and expectations of the ACNC. Additionally, the majority of compliant charities in the sector and the donating public may benefit from the ACNC disclosing information about charities that are engaging in misconduct following a finalised investigation. Equally, charities will benefit from public disclosures in this area if an investigation into a charity has cleared it of any alleged wrongdoing or misconduct.

Disclosing the reasons for revocation of a charity's registration would provide the public with a greater degree of transparency about the ACNC's revocation decisions. This could enhance public trust and confidence in the ACNC as an effective regulator. The public (including donors, members, volunteers and beneficiaries) can be informed of any risks about a former charity, where a knowledge of the circumstances of revocation and any serious misconduct would affect a person's current or future interactions with the former charity.

¹³ Revocation of a charity's registration is not an enforcement power under Part 4-2 of the ACNC Act.

The ACNC would also be able to correct the public record and prevent misinformation in situations where the public may infer or draw false conclusions about an ACNC investigation into a charity, any actions taken as a result, and the reasons for those actions.

In contrast, ASIC, the ACCC, the UK Charity Commission and New Zealand Charities Services can publish information about finalised investigations and resulting compliance action. In the UK and New Zealand, these charity regulators routinely publish the reasons for revocations (refer Box 3).

Box 3: UK Charity Commission disclosure on finalised investigation

Press release

Royal charities did not act outside charity law

The Charity Commission has found that the charity MWX Foundation (formerly Sussex Royal: The Foundation) did not act outside charity law in transferring funds to Travalyst.

From: **The Charity Commission**

Published 25 May 2021

The Commission opened a case into the MWX Foundation (charity number 1185074, established by the Duke and Duchess of Sussex) in July 2020. This followed concerns about the use of funds received by MWX Foundation from the charity 'The Royal Foundation Of The Duke And Duchess Of Cambridge', formerly 'The Royal Foundation of the Duke and Duchess of Cambridge and the Duke and Duchess of Sussex ('the Royal Foundation')'.

MWX Foundation received an unrestricted grant of £145,000 from the Royal Foundation to start up the charity in 2019. A further £151,855 was received from the Royal Foundation to deliver Travalyst's sustainable travel programme, which was transferred by MWX Foundation to Travalyst. In July 2020, the trustees made the decision to wind up the MWX Foundation.

The regulator found:

- the transfer of funds to MWX was in line with the governing document of the Royal Foundation and allowed under charity law.
- the transfer of funds by MWX to Travalyst was also lawful.
- Travalyst could receive charitable funds for the promotion of sustainable travel only, which is a charitable activity in law.
- there was no evidence to suggest that any conflicts of interest between MWX and Travalyst were managed inappropriately.

The Commission has provided the charity with regulatory advice to ensure that the funds transferred to Travalyst are applied for exclusively charitable purposes, and the Commission and the charity have agreed how the charity will comply with this guidance.

The regulator also looked at MWX Foundation's expenditure, finding almost half of its funds were spent on legal and administrative costs. Trustees can legitimately use charitable funds for legal advice and other professional and administrative costs to set up and close a charity and ensure it can operate effectively.

The Commission noted that trustees took a decision to close this charity just 12 months after it was established, doing so during difficult and unexpected circumstances. It considers that the spending itself was not unreasonable given the unexpected events and unique circumstance which surrounded this charity and as such does not consider that further action is required.

However, the Commission has found that decisions on spending were not adequately documented, limiting the ability of the trustees to demonstrate the reasons behind those decisions. The failure to properly record decisions does not represent best practice and is not in line with Charity Commission guidance.

As in this case, the Commission accepts that trustees cannot predict future events when setting up charities. However, its [general guidance](#) is that those establishing a new charity must carefully consider whether doing so is the best and most efficient way of achieving the intended charitable aims, ensuring as far as possible that initial costs are offset by the charity's longer-term impact.

Helen Earner, Director of Regulatory Services at the Charity Commission, said:

"The public expects charities to make a real positive difference for the people they help or the cause they pursue. Where concerns are raised with us, whatever the charity, it's right that we examine them and consider the issues carefully.

"In this case we have found that the trustees complied with their duties under charity law, and the transfers of funds between different organisations were in keeping with the charities' governing documents, with conflicts of interest being appropriately managed.

"The MWX Foundation should, though, have done more to document its decisions, especially regarding the charity's expenditure on legal and administrative costs.

"We also note that a substantial proportion of funds went into setting up and then winding up a charity that was active for a relatively short period of time. Trustees cannot predict future events when establishing a new charity – circumstances can change after a charity has been set up. But all trustees, before setting up a charity, should think about the longer term, and consider carefully whether a new charity is the best way of achieving the intended aims. This helps ensure that set up costs are offset by longer-term impact.

As the charity is the process of winding up, and in addition to formal advice regarding the application of the funds to Travalyst, the Commission has offered the charity general guidance regarding the dissolution process.

A separate case was opened into the Royal Foundation to investigate the decision to transfer funds to MWX Foundation. The Commission found the trustees of the Royal Foundation acted in accordance with the regulator's guidance and found no issues of concern.

Source: <https://www.gov.uk/government/news/royal-charities-did-not-act-outside-charity-law>

Questions

- 11) Do you have any concerns (other than privacy and confidentiality) about the disclosure of information on finalised investigations and resulting compliance action?
- 12) Under what circumstances do you think information about finalised investigations and the reasons for revoking a charity's registration should be disclosed and why?
- 13) Should a public interest test form the basis of the discretion to disclose information about finalised investigations and any resulting compliance action (including revocation, alternative regulatory approaches and no action) and why?

Consolidated list of discussion questions for stakeholders

ACNC's current secrecy provisions

- 1) What is your experience of the ACNC's current secrecy provisions in your capacity as an individual, charity or other organisation?
- 2) What concerns, if any, do you have about the ACNC's current secrecy provisions?

Public interest benefits and risks

- 3) If a public interest test were to form the basis of the ACNC Commissioner's discretion to disclose information about the ACNC's regulatory activities, what public interest benefits should the ACNC Commissioner take into consideration when exercising the discretion and why?
- 4) If a public interest test were to form the basis of the ACNC Commissioner's discretion to disclose information about the ACNC's regulatory activities, what risk factors should the ACNC Commissioner take into consideration when exercising the discretion and why?

Area 1: Reasons for registration decisions

- 5) Do you have any concerns (other than privacy and confidentiality) about the disclosure of registration decisions?
- 6) Will your concerns be addressed if the information is de-identified?
- 7) Should a public interest test form the basis of the discretion to disclose information about reasons for registration and why?

Area 2: New and ongoing investigations

- 8) Do you have any concerns (other than privacy and confidentiality) about the disclosure of the fact that an investigation into a registered charity has commenced or is ongoing or that no investigation is being undertaken?
- 9) Would your concerns be mitigated if the ACNC Commissioner could only confirm if an investigation is or is not underway?
- 10) Should a public interest test form the basis of the discretion to disclose information about new and/or ongoing investigations and why?

Area 3: Finalised investigations and resulting compliance action

- 11) Do you have any concerns (other than privacy and confidentiality) about the disclosure of information on finalised investigations and resulting compliance action?
- 12) Under what circumstances do you think information about finalised investigations and the reasons for revoking a charity's registration should be disclosed and why?
- 13) Should a public interest test form the basis of the discretion to disclose information about finalised investigations and any resulting compliance action (including revocation, alternative regulatory approaches and no action) and why?